

FILED
May 20, 2015
Court of Appeals
Division I
State of Washington

NO. 72524-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OLA MAE IVORY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant could not be convicted of Retail Theft With Special Circumstances because there was no such crime at the time of her criminal conduct.

Issue Pertaining to Assignment of Error

At the time of appellant's crime, the offense she committed was called Retail Theft With *Extenuating* Circumstances. The name was later changed to Retail Theft With *Special* Circumstances, which is the name used on appellant's judgment. Should the judgment be amended to reflect the proper name?

B. STATEMENT OF THE CASE

The King County Prosecutor's Officer charged Ole Mae Ivory with (count 1) Retail Theft With Special Circumstances in the Third Degree and (count 2) Identify Theft in the Second Degree. Both offenses were alleged to have occurred on December 23, 2013. CP 1-2.

More than once, the parties and trial judge struggled with whether count 1 properly identified the crime at issue. Effective January 1, 2014, the name of the crime was changed from Retail Theft With *Extenuating* Circumstances to Retail Theft With *Special* Circumstances. See RCW 9A.56.360; Laws of 2013, ch. 153, §§

1, 3.

The information uses the 2014 language in reference to Ivory's 2013 conduct – referring to *Special* Circumstances. CP 1. The defense initially objected when the State submitted proposed jury instructions referring to *Extenuating* Circumstances, and the State agreed just to mirror the information. 3RP¹ 142-143.

When defense counsel later pointed out the confusion stemmed from the 2014 legislative change, the trial judge indicated the proper name of the crime should be the name that was used when the crime was committed and charged. 3RP 150. Although that reasoning required use of *Extenuating*, it appears the court was still confused and mistakenly believed the statute had used *Special* in December 2013. 3RP 150.

The issue arose again when the court took formal exceptions to instructions. Defense counsel indicated that the State had charged using the incorrect language and noted the information should have used *Extenuating* given the date of the crime. 4RP 5. The trial judge said she would leave it to the State whether it wanted

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – June 19, 2014 (early a.m.); 2RP – June 19, 2014 (begins 10:16 a.m.); 3RP - June 23, 2014 (mistakenly identified as June 6 on cover); 4RP – June 24, 2014; 5RP – September 26, 2014.

to move to amend the information, but that it would otherwise stick with *Special* while noting the defense exception to every instruction using that word. 4RP 5-7, 9.

Evidence at trial revealed that on the afternoon of December 23, 2013, Ola Mae Ivory entered a Seattle Abercrombie & Fitch store, placed two pair of men's jeans in a shopping bag already in her possession, and walked out of the store without paying for the items. 3RP 103-106. The jeans were worth \$176.00. 3RP 118. Store security stopped Ivory. 3RP 106. Ivory turned over the jeans, and initially resisted when told she needed to go to the security office before eventually complying. 3RP 108-109.

Police were called to the scene. 3RP 122. When asked to provide identification, Ivory produced a Washington driver's license with the name Ida Hightower and repeatedly claimed to be Hightower. 4RP 15-16, 24-25. In fact, Hightower – who did not know Ivory – had her license stolen from her purse earlier that month. 4RP 30-33. Ivory was using a foil-lined shopping bag of the type used to defeat security sensors when exiting the store. 3RP 123-124; 4RP 16-18.

Ivory explained to police that she had met a man a few days earlier with the initials Y.G. – a black man with dreadlocks – who had

forced her to steal a pair of pants for him and who said she could also steal a second pair for herself.² 3RP 133. Apparently referring to the pair she was to keep, Ivory said that her son had wanted pants. 3RP 132. Ivory was unwilling to assist any further in helping police find Y.G., however, explaining that “he might kill me.” 3RP 134, 136-137. Police were not familiar with a person matching the description of Y.G. and could not confirm his existence. 3RP 134-135; 4RP 20-21.

Jurors convicted Ivory of Retail Theft With Special Circumstances in the Third Degree and acquitted her of Identity Theft in the Second Degree. CP 16-17.

At sentencing, the prosecutor referred to Ivory’s conviction as one for Retail Theft With *Extenuating* Circumstances in the Third Degree. 5RP 3. The Judgment and Sentence, however, refers to the crime as Retail Theft With *Special* Circumstances in the Third Degree. CP 60. Ivory was sentenced to three months’ confinement (which could be served in work release), and she timely filed her Notice of Appeal. CP 63, 67.

² Ivory’s statements to police were found admissible following a CrR 3.5 hearing. See CP 51-54.

C. ARGUMENT

APPELLANT CANNOT BE CONVICTED OF A CRIME THAT DID NOT EXIST WHEN SHE COMMITTED RETAIL THEFT.

The effective date of the law converting Retail Theft with Extenuating Circumstances to Retail Theft with Special Circumstances was January 1, 2014. See Laws of 2013, ch. 153, §§ 1, 3.

Application of a statute to conduct preceding its effective date violates due process and, where the statutory change is substantive, may require reversal of any offending conviction. See State v. Aho, 137 Wn.2d 736, 742-744, 975 P.2d 512 (1999). The 2014 change to RCW 9A.56.360 was not substantive, however. The elements of the offense were not modified; only the name of the offense was changed and every statutory reference to “extenuating circumstances” was changed to “special circumstances.” See Laws of 2013, ch. 153, §§ 1, 3.

Thus, the error at Ivory’s trial is more in the nature of a clerical mistake, which can be corrected by simply modifying the judgment and sentence to reflect that Ivory has been convicted of

Retail Theft With Extenuating Circumstances in the Third Degree.³

See CrR 7.8(a) (clerical mistakes in a judgment can be corrected by trial court); State v. Casarez, 64 Wn. App. 910, 915, 826 P.2d 1102 (1992) (changing date of offenses and recognizing that clerical mistakes include those “apparent on the record which do not involve matters of substance”), aff’d State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993).

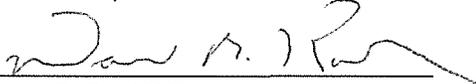
D. CONCLUSION

This case should be remanded for modification of the judgment and sentence to reflect the proper name of the crime.

DATED this 20th day of May 2015.

Respectfully submitted,

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³ Undersigned counsel recognizes the mistake in Ivory’s judgment could be rectified – by agreement of the parties – without the need for this Court’s review and intervention, thereby rendering the appeal moot. However, Ms. Ivory may wish to exercise her right to file a Statement of Additional Grounds for Review, thereby requiring review of additional issues.